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ICON CITY DEVELOPMENT SDN BHD v. K-SHIN CORPORATION SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
LEE HENG CHEONG JCA
B MARIANA YAHYA JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1596-08-2018]
19 SEPTEMBER 2022

C **Abstract** – *(i) Vacant possession is not synonymous with right of occupation, as clearly defined in the sale and purchase agreement. The developer only required to physically complete the works and provide a certificate of practical completion to provide vacant possession; it matters not if the premises is connected with essential utilities; (ii) letters by the architect of a project merely serves the purpose of informing the purchaser* D *of the delay of the project; it does not qualify as a certificate of extension of time which would justify the developer's delaying in the delivery of vacant possession of the premises; (iii) when a purchaser successfully discharges its burden of proof that there was a breach of contract and the sale and purchase agreement contains a clause specifying a sum to be* E *paid upon the breach, the purchaser is entitled to the liquidated ascertained damages (LAD), especially when the rate of the LAD is fair and reasonable.*

F ***LAND LAW:*** *Housing developers – Vacant possession – Delay in delivering vacant possession – Claim for liquidated ascertained damages (LAD) – Whether architect's letters valid extensions of time under sale and purchase agreement – Whether vacant possession synonymous with right of occupation – Whether rate of LAD fair and reasonable – Whether purchaser's action against developer premature*

G The plaintiff ('respondent') entered into a contract with the first defendant ('appellant') *vide* a sale and purchase agreement ('SPA') to purchase a unit of an eight-storey shop office ('shop office') from the appellant. The date of completion and delivery of vacant possession of the shop office by the appellant to the respondent as stipulated in the contract was on or before the H expiry of 36 months from the date of the period of approval or the extended period of approval ('the 36 months period'). The contract also stipulated that the appellant shall pay liquidated ascertained damages ('LAD') at the rate of 10% of the purchase price to be calculated from day to day in the event that the appellant fails to complete and deliver vacant possession of the shop office to the respondent within the specified period. However, the contract I allowed the second defendant ('the architect') to make a fair and reasonable extension of time of the 36 months' period for completion and delivery of

vacant possession of the shop office if, in the opinion of the architect, the completion and delivery of vacant possession of the shop office was delayed by any such cause beyond the appellant's control. Subsequently, the architect issued two letters of extensions of time dated 14 August 2015 and 21 December 2015 respectively, purportedly to extend the 36 months' period for completion and delivery of vacant possession of the shop office, initially from 4 June 2015 to December 2015 and subsequently from December 2015 to 15 January 2016 on the ground that there were disputes or issues arising from the contract between the appellant and its contractor. As a result of the architect's two letters of extensions of time, the appellant refused to pay LAD to the plaintiff. The plaintiff disputed the validity of the architect's two letters of extensions of time on the ground that disputes or issues arising from the construction contract between the appellant and its contractor could not be considered as a cause beyond the appellant's control as the appellant could enforce the construction contract against its contractor. Hence, the respondent claimed that the architect did not issue the two letters of extensions of time in accordance with the express terms of the contract, thus those letters were invalid and were unfairly and unreasonably issued. The respondent took the position that the architect was negligent in issuing the two letters of extension of time as the architect had breached its duty of care which was owed to the respondent. On 25 February 2016, the appellant purported to deliver actual vacant possession of the shop office to the respondent but the respondent claimed that the delivery of vacant possession on the said date was invalid as the water and electricity mains were not connected and the certificate of completion and compliance ('CCC') for the project had not been issued and remained outstanding. The respondent also took the position that even if the delivery of vacant possession on 25 February 2016 was valid, it was late as the appellant was contractually obliged to deliver it on 4 June 2015 since the respondent's position was that the architect's two letters of extension of time were invalid. The respondent claimed that there was a delay of 265 days from 4 June 2015 to 25 February 2016 and the appellant was liable to pay the respondent LAD of a sum of RM1,052,739.73. The respondent filed a suit to claim for declaratory relief against both the appellant and the architect. After a full trial, the High Court Judge ('HCJ') found in favour of the respondent, holding that the appellant was liable to the respondent for, *inter alia*, LAD in the sum of RM1,779,726.02 and other associated claims due to the delay of the appellant in delivering the vacant possession of the shop office. Aggrieved, the appellant appealed. The issues that arose were, *inter alia* (i) whether the architect's letters were valid extensions of time under the SPA; (ii) when was vacant possession of the shop office delivered to the respondent; (iii) whether the respondent needed to prove damages; and (iv) whether the respondent's action against the appellant was premature.

A B C D E F G H I

Held (allowing appeal in part)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The appellant's architect, PW2, testified that the architect's letters merely served the purpose of informing the appellant of the delay of the project. As such, the architect's letters did not qualify as a certificate of extension of time which would justify the appellant's delaying the delivery of vacant possession of the shop office to the respondent. The appellant's claims that the breaches by their main contractor and its application for restructuring pursuant to s. 176 of the Companies Act 1965 were events beyond its control to which it was entitled to extensions of time, had no merits. The breaches caused by the main contractor's restructuring exercise were not force majeure events and were not beyond the appellant's control in the project under cl. 13.1.1 of the SPA. (paras 25-27)

(2) The definition of the manner of vacant possession was clearly defined in cl. 13.2 of the SPA, which states that upon issuance of a certificate by the appellant's architect certifying that the construction of the shop office had been duly completed, the purchaser, having paid all monies payable under the SPA and having performed and observed all terms and conditions on the respondent under the SPA, the appellant shall let the respondent into possession of the shop office. However, such possession shall not give the respondent the right to occupy and the respondent shall not occupy the shop office or to make any alterations, additions or otherwise to the said shop office until such time as the CCC for the office shop was issued. As such, without a right of occupation, the issue of actual electricity and water supply were not relevant and neither did the SPA specify these requirements. There was a clear difference between 'occupation' and 'possession'. Vacant possession is not synonymous with the right of occupation. Since cl. 13.2.1 of the SPA clearly provides for the manner of delivery of vacant possession and which had been complied with by the appellant, delivery of vacant possession to the respondent was on 30 December 2015 as per the appellant's letter bearing the same date. There was thus merit in the appellant's contention that cl. 13 of the SPA merely requires the appellant to physically complete works and provide a certificate of practical completion by the architect as sufficient to provide vacant possession and that it would matter not, if the shop office was not connected with the essential utilities. (paras 32, 37, 38 & 39)

(3) The respondent had successfully discharged its burden of proof, firstly, that there was a breach of contract and that secondly, the SPA contained a clause specifying a sum to be paid upon breach which was cl. 13.1.2 of the SPA read with s. 7 of Schedule A of the SPA. Herein, under the SPA, the agreed rate of LAD was 10 % per annum of the purchase price

of the shop office, which was similar to the rate of liquidated damages awarded in statutorily prescribed sale and purchase agreements such as Schedule G or H of the Housing Development Amendment Act 2012. Thus, such a rate of LAD was fair and reasonable. (paras 44-46)

(4) The respondent took vacant possession of the shop office on 25 February 2016. The architect had duly certified that the construction of the shop office had been duly completed *via* the architect's certificate *via* letter dated 28 December 2015 and thus, the requirements for vacant possession under cl. 13.2.1 of the SPA had been duly satisfied. Thus, the present action was not premature. Even if the respondent did not take actual possession of the shop office, by virtue of the deeming provision of possession as stated in cl. 13.1.3 of the SPA, the respondent would be deemed to have taken possession and thus was entitled to initiate legal action against the appellant. (paras 52-55)

(5) The HCJ made errors warranting appellate intervention as there were merits in the appellant's appeal. In the premises, the appellant was ordered to pay to the respondent, the sum of RM834, 246 as liquidated damages calculated from 4 June 2015 until 30 December 2015 together with interest of 5% per annum from the date of the judgment of the High Court until full and final payment. (para 59)

Case(s) referred to:

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 HC ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176

Contracts Act 1950, s. 75

Housing Development (Control and Licensing) (Amendment) Act 2012, Schedule G, H

Housing Development (Control and Licensing) Regulations 1989, Schedule H

For the appellant - Justin Voon Tiam Yu, Lee Chooi Peng & Lim Xin Yi; M/s Justin Voon Chooi & Wing

For the respondent - Joshua Chong Wan Ken, Khor Yongshi & Chan Jia Her; M/s Raja, Darryl & Loh

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-492-08-2016 (overruled in part).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Lee Heng Cheong JCA:

Introduction

B **[1]** The appellant was the first defendant in the High Court ("appellant") whilst the respondent was the plaintiff in the High Court ("respondent"). The respondent's case against SN Low & Associates Sdn. Bhd., which is a body of professional architects and which is the second defendant in the High Court had been struck out.

C **[2]** The appellant appealed against the decision of the High Court in allowing the claim of the respondent against the appellant pursuant to the Sale and Purchase Agreement dated 30 June 2011 ("SPA") for the liquidated ascertained damages ("LAD") for the delay in delivery of the vacant possession of a unit of eight-storey shop offices identified as Parcel No. A-16, Block No. A ("shop office") in the Icon City Project ("project") as well D as for the refund of services charges and insurance which were paid prematurely.

Background

[3] The pertinent facts of this case have been summarised by the learned E High Court Judge ("learned High Court Judge") in her grounds of judgment and we will adopt the same herein for ease of reference. They are as follows:

(1) On 30/6/2011, the Plaintiff entered into a contract with the 1st defendant *vide* a sale and purchase agreement to purchase the shop office from the 1st defendant;

F (2) The date of completion and delivery of vacant possession of the shop office by the 1st defendant to the plaintiff as stipulated in the contract is on or before the expiry of 36 months from the date of the Period of Approval or the Extended Period of Approval ("the 36 months' period');

G (3) The contract defines the Period of Approval as 12 months from the date of the contract to obtain the Development Order, the Conversion Approval and the Approval of the Building Plans from the Relevant Authorities;

(4) The contract stipulated that the 1st defendant shall pay LAD to the H plaintiff at the rate of 10% of the purchase price to be calculated from day to day in the event that the 1st defendant shall fail to complete and deliver vacant possession of the shop office to be plaintiff within the Specified Period or the extended time allowed by the 2nd defendant;

I (5) Subsequently, the 1st defendant confirmed in a letter dated 8/4/2016 that the Development Order, the Conversion Approval and the Approval of the Building Plans from the Relevant Authorities were obtained on 5/6/2012;

(6) Hence, pursuant to the contract between the 1st defendant and the plaintiff, the 36 months' period for the completion and delivery of the shop office will expire on 4/6/2012 (should be "4/6/2015");

(7) However, the contract allows the 2nd defendant being the Architect to make a fair and reasonable extension of time of the 36 months' period for completion and delivery of vacant possession of the shop office;

(8) If in the opinion of the 2nd defendant, the completion and delivery of vacant possession of the shop office is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any such cause beyond the 1st defendant's control;

(9) Subsequently, the 2nd defendant issued 2 letters of extensions of time dated 14/8/2015 and 21/12/2015, respectively, purportedly to extend the 36 months' period for completion and delivery of vacant possession of the shop office, initially from 4/6/2015 to December 2015 and subsequently, from December 2015 to 15/1/2016 on the ground that there were disputes or issues arising from the contract between the 1st defendant and its contractor ("the 1st defendant's contractor");

(10) As a result of the 2nd defendant's 2 letters of extensions of time, the 1st defendant refused to pay LAD to the Plaintiff for the late completion and delivery of vacant possession of the shop house to the plaintiff;

(11) The plaintiff disputed the validity of the 2nd defendant's 2 letters of extensions of time on the ground that disputes or issues arising from the construction contract between the 1st defendant and the 1st defendant's contractor could not be considered as a cause beyond the 1st defendant's control;

(12) This is because the plaintiff took the position that the 1st defendant could enforce the construction contract against the 1st defendant's contractor;

(13) Hence, the plaintiff took the position that the 2nd defendant did not issue the 2 letters of extensions of time in accordance with the express terms of the contract between the 1st defendant and the plaintiff and that the defendant's 2 letters of extensions of time were invalid as the 2nd defendant had abused the power given to the 2nd defendant under the contract between 1st defendant and the plaintiff to issue them;

(14) The Plaintiff also took the position that the 2nd Defendant's letters of extension of time were unfairly and unreasonably issued by the 2nd defendant;

(15) This is because of the plaintiff took the position that the 2nd defendant owed to the plaintiff (and other purchasers) a duty of care and also a professional duty to ensure that any letter for an extension of time falls within the express contractual term between the 1st defendant and plaintiff;

(16) Hence, the plaintiff took the position that the 2nd defendant was negligent in issuing the 2 letters of extension of time as the 2nd defendant had breached the 2nd defendant's duty of care which the 2nd defendant owed to the plaintiff (and other purchasers) and also the 2nd defendant's professional duty;

(17) On 28/12/2015, the 2nd defendant certified that the plaintiff had paid the purchase price in accordance with the manner of payment as stipulated in the contract;

(18) On 30/12/2015, the 1st defendant issued a letter to the plaintiff informing the plaintiff that vacant possession of the shop office was ready to be delivered;

(19) However, the plaintiff took the position that the shop office was not ready for delivery of vacant possession as the electricity and water mains were not made available and were not ready for connection to the shop office, the permanent access road to the shop office was not made ready or available and the Certificate of Completion and Compliance ("the CCC") has not been issued for the Project and remains outstanding;

(20) On 19/2/2016, the 1st defendant issued a discharge memo stating that the plaintiff had complied with all the conditions for the delivery of vacant possession to the plaintiff;

(21) On 25/2/2016, the 1st defendant purported to deliver actual vacant possession of the shop office to the plaintiff;

(22) But the plaintiff took the position that the delivery of vacant possession on 25/2/2016 was invalid as the water and electricity mains were not connected and the CCC for the project has not been issued and remains outstanding;

(23) The plaintiff also took the position that even if the delivery of vacant possession on 25/2/2016 was valid, it was late as the 1st defendant was contractually obliged to deliver it on 4/6/2015 since the plaintiff's position was that the 2nd defendant's two letters of extensions of time were invalid;

(24) Hence, the plaintiff took the position that there was a delay of 265 days from 4/6/2015 to 25/2/2016 and the 1st defendant was liable to pay to the plaintiff LAD of a sum of RM1,052,739.73 at RM3,972.60 a day;

(25) This is because the formula for the calculation of the LAD for the 1st defendant's delay in delivering the vacant possession of the shop office to the plaintiff, as stipulated in Clause 13.1.2 read together with Section 7 of Schedule A of the contract, is 10% of the purchase price;

(26) Since the purchase price of the shop office is RM14,500,000.00 and 10% of the purchase price of RM14,500,000.00 is RM1,450,000.00, the plaintiff arrived at a daily LAD of a sum of RM3,972.60 as follows:

RM1,450,000.00 x 1/365 days= RM3,972.60

(27) The plaintiff calculated the sum of RM1,052,739.73 that the plaintiff has claimed from the 1st defendant as follows:

RM1,450,000.00 x 265/365 days= RM1,052,739.73

(28) Therefore, on 5/8/2016, the plaintiff filed this suit to claim for declaratory relief against both defendants, the sum of RM1,052,739.73 as LAD for the 1st defendant's breach of contract in the late delivery of vacant possession of the shop office to the plaintiff and any other sum of LAD as determined by the Court against the 1st defendant, alternatively, the sum of RM1,052,739.73 as damages against the 2nd defendant for the 2nd defendant's negligence in the issuance of the 2 (two) Architect's letters for extensions of time, interest and costs.

[4] The Certificate of Completion and Compliance ("the CCC") of the shop office was only obtained by the respondent on 26 August 2016, *ie*, after the respondent filed its suit on 5 August 2016, which copy of the CCC was served on the respondent *vide* the appellant's letter dated 2 September 2016. (encl. 24 at p. 128; RA/2D/734)

[5] The respondent's case against the second defendant was for negligence in the issuance of two architect's letters of extension of time dated 14 August 2015 and 21 December 2015 respectively (collectively "architect's letters"). The second defendant was appointed by the appellant to act as the appellant's consultant architect and is the appointed architect under the SPA ("architect"). The second defendant applied to strike out the suit against them *vide* a notice of application dated 15 September 2016 which was allowed by the High Court on 8 August 2017. An appeal by the respondent against that decision to the Court of Appeal was dismissed.

[6] The reliefs sought by the respondent against the appellant can be gleaned from the amended statement of claim (encl. 24 at pp. 130 to 149; RA/1A/136 to 155), particularly pp. 153 to 154 (English version) (encl. 24 at pp. 147 to 148; RA/1A/153 to 154).

[7] After full trial, the learned High Court Judge ("learned High Court Judge") found in favour of the respondent.

[8] Dissatisfied, the appellant appealed against this decision to this court.

[9] This is a unanimous decision of the court. We heard this appeal on 6 May 2021 and allowed the appeal in part. These are our grounds for our decision.

[10] The parties herein shall be referred to, in their respective capacities before this court.

The Findings Of The Learned High Court Judge

[11] After full trial, the learned High Court Judge found in favour of the respondent, holding that the appellant was liable to the respondent for, *inter alia*, LAD in the sum of RM1,779,726.02 and other associated claims due to the delay of the appellant, in delivering the vacant possession of the shop office. The learned High Court Judge granted *inter alia* the following orders and sums in the court judgment dated 18 July 2018 with interests and costs as follows:

(1) Surat-Surat Arkitek bertarikh 14/8/2015 dan 21/12/2015 bukan lanjutan masa di bawah klausa 13.1.1 Perjanjian Jual Beli bertarikh 30/6/2011 antara Plaintif dan Defendan;

(2) Defendan membayar kepada Plaintif jumlah sebanyak RM1,779,724.80 sebagai ganti rugi jumlah tertentu;

(3) Defendan membayar kepada Plaintif jumlah sebanyak RM9,894.60 sebagai bayaran balik caj servis;

(4) Defendan membayar kepada Plaintif jumlah sebanyak RM3,957.84 sebagai bayaran balik sumbangan kumpulan wang penjelas;

(5) Defendan membayar kepada Plaintif jumlah sebanyak RM2,629.00 sebagai bayaran balik premium insurans;

The Appellant's Contentions

[12] Before us, the appellants contended *inter alia* as follows:

(i) that the learned High Court Judge erred in her decision and also granted a judgment which is excessive and beyond the ambit of the action and/or the pleaded case;

(ii) that the learned High Court Judge erred in awarding the LAD as it was not proven by the respondent;

(iii) that the learned High Court Judge was wrong in granting the interest on the LAD, to run from a date earlier than the judgment date;

(iv) that there were extensions of time granted by the architect pursuant to cl. 13.1.1 of the SPA by way of the architect's letters which extended the time for the appellant to deliver vacant possession until 15 January 2016;

(v) that there can be no cause of action if the respondent did not take possession as cl. 13.1.3 of the SPA stipulated that the respondent can only sue for LAD only if the respondent took possession of the shop office. Thus, the respondent had no cause of action as the CCC was only obtained on 26 August 2016 and the writ was filed on 5 August 2016. Thus, the present action was premature; and

(vi) that the learned High Court Judge had introduced an unpleaded cause of action based on purported "implied term" into the SPA which is directly contradictory to the plain and ordinary meaning of words of the SPA.

The Respondent's Contentions

[13] The respondent *inter alia* contended as follows:

(i) that the appellant allegedly delivered vacant possession of the shop office to the respondent by 25 February 2016. However, the shop office was not ready for delivery of vacant possession for various reasons;

(ii) that the architect's letters cited disputes or issues arising between the appellant and its contractor, which cannot be a cause beyond the appellant's control as defined in cl. 13.1.1 of the SPA. Thus, the architect's letters are invalid;

(iii) further, the architect at trial admitted that the architect's letters were merely to inform the appellant of delays, and were not issued pursuant to the SPA and the architect's letters make no mention of the SPA or cl. 13.1.1;

(iv) that the learned High Court Judge correctly found that the architect's letters were not valid and not applicable, and that the events the appellant relied on (namely, breaches and defaults by its own main contractor) were not out of the appellant's control and did not entitle the appellant to additional time;

(v) that valid vacant possession of the shop office was not delivered until Essential Amenities were available for the shop office and the CCC for the shop office issued;

(vi) that LAD accrued from the end of the specified period on 4 June 2015 until issuance of the CCC on 26 August 2016; and

(vii) that the sinking fund premium, service charges and insurance period paid by the respondent for the shop office premised on invalid vacant possession was premature and ought to be refunded to the respondent.

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Our Analysis And Decision

[14] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

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> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

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[15] In the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, the Federal Court held that:

> [12] *In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.*
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> (emphasis added)

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[16] In the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, Zabariah Mohd Yusof FCJ delivering the judgment of the court, held *inter alia* as follows:

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> (1) *An appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records.* In the UK, the test adopted by the appellate courts is not whether the higher courts feels that it would have reached a different conclusion on the same fact as the trial court, but *whether or not the decision by the lower court on findings of fact was reasonable. If the trial judge's decision can be reasonably explained and justified, then the appellate courts should refrain from intervention.* (paras 33, 34 & 60)

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> (2) *The court in Henderson separated the four nonexhaustive identifiable errors of a trial judge from the plainly wrong test: (i) a material error of law; (ii) a critical finding of fact which has no basis in the evidence; (iii) demonstrable misunderstanding of relevant evidence; and (iv) a demonstrable failure to consider relevant evidence. The*

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phrase 'lack of judicial appreciation of evidence' used in Gan Yook Chin & Anor v. Lee Ing Chin & Ors could very well encompass three out of four errors of a trial judge identifiable in Henderson. Whilst there was a slight difference in the approach of the appellate intervention, both the UK Supreme Court and the Federal Court effectively shared a common thread where it had been held that appellate intervention was justified where there is lack of judicial appreciation of evidence. What is pertinent is that the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. (paras 54, 72, 74 & 76)

(3) *An appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. …*

(4) … (9) …

(10) *Henderson* was not setting any guidelines to the plainly wrong test. It merely provided a construction as to what amounts to the 'plainly wrong' test in an appellate intervention. Rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test should be retained as a flexible guide for appellate courts. … (emphasis added)

[17] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant's appeal.

[18] It is common ground that the appellant did not deliver vacant possession of the shop office by 4 Jun 2015. The respondent complained that this was a breach of the SPA and the appellant was liable to pay LAD to the respondent.

[19] The clause which is the subject matter of the dispute is cl. 13 of the SPA on the "Time and Manner of Delivery of Vacant Possession", which is reproduced here:

13.1 *Delivery of vacant possession*

13.1.1 *The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this Agreement within the period stated in section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by reason of the Purchaser requiring the execution of any addition, works or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.*

13.1.2 *In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1 the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer and such sums shall be calculated from the date of expiry of the period stated in Section 1O of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.*

13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

13.2 *Manner of vacant possession*

13.2.1 *Upon issuance of a certificate by the Developer's architect certifying that the construction of the Said Parcel has been duly competed and the Purchaser having paid all monies payable under this Agreement and having performed and observed all terms and conditions on the Purchaser's part under this Agreement, the Developer shall let the Purchaser into possession of the said Parcel PROVIDED ALWAYS THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel or to make any alterations additions or otherwise to the said Parcel until such time as the Certificate of Completion and Compliance for the said Parcel is issued.*

13.2.2 *Upon the expiry of fourteen (14) days from the date of notice from the Developer requesting the Purchaser to take possession of the said Parcel whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession of the said Parcel* and the Developer shall thereafter not be liable for any loss and/or damage to the said Parcel or to the fixtures and fittings therein. (emphasis added)

Whether The Second Defendant's Architect's Letters Are Valid Extensions Of Time Under The SPA?

[20] Clause 13.1.1 of the SPA states that the appellant must deliver vacant possession of shop office within 36 months from the date of the period approval or the extended period approval ("specified period"). The exception to this general rule in the SPA is that, if in the opinion of the architect, delivery of vacant possession of the shop office is delayed by reason of exceptional causes as stated in cl. 13.1.1, then, the architect shall grant a fair and reasonable extension of time in favour of the appellant.

[21] Clause 13.1.2 of the SPA further states that in the event that the appellant fails to deliver vacant possession of the shop office within the specified period (or the extended time allowed by the architect), the appellant shall pay to the respondent, liquidated damages at the rate of 10% of the

purchase price per annum on daily rests pursuant to the SPA. These liquidated damages would start from the specified period to the actual date of delivery of vacant possession of the shop office to the respondent.

[22] Further, according to cl. 25.1 of the SPA, the appellant shall be responsible for connecting and applying for connection of utilities and services which serves the shop office (water, electricity, sewerage, telephone, as piping, sanitary, cooling ducts and so on)', at its own cost and expense.

[23] It is undisputed that the specified period in the SPA ends on 4 June 2015. The appellant's contention is that there were extensions of time granted by the architect pursuant to cl. 13.1.1 of the SPA by way of the architect's letters which extended the time for the appellant to deliver vacant possession until 15 January 2016.

[24] Our perusal of the learned High Court Judge's grounds of judgment showed that she has considered this issue correctly. This is what she said at paras. 175 and 179 of her grounds of judgment:

> [175] Even a cursory reading of the architect's letters will show that they were *not extensions of time under the SPA. The architect's letters:*
>
> (1) *Make no mention of the SPA let alone the specific Clause 13.1.1;*
>
> (2) *Do not state that in the opinion of the architect, the events in the said letters were events beyond the Developer's control or events which fall within any of the grounds in Clause 13.1.1; and*
>
> (3) *The letters do not state any opinion at all and merely state that there would be delays in the completion of the construction works.*
>
> …
>
> …
>
> [179] The architect's letters *are clearly not Certificates of Extension of Time* for the following reasons:
>
> (1) *They are addressed to the first defendant and not the main contractor (they are not copied to the main contractor either);*
>
> (2) *They make no reference to the PAM Contract let alone Clause 23 therein;*
>
> (3) *They do not state that they are certificates of extension of time;*
>
> (4) *They make no mention of the main contractor's application for extension of time let alone that the architect accepts or rejects those applications;*
>
> (5) *They make no mention that the grounds therein are relevant events pursuant to Clause 23.8 of the PAM Contract; and*
>
> (6) *(In fact, breaches by the main contractor are obviously not a relevant event pursuant to Clause 23.8 of the PAM Contract).* (See: Enclosure 24, pp. 83 to 85) (emphasis added)

[25] In making the findings that the architect's letters are not the Certificates of Extension of Time, the learned trial judge also took into consideration of the testimony of PW2, the appellant's architect, who testified that the architect's letters merely served the purpose of informing the appellant of the delay of the project.

[26] As such, we are of the opinion that the architect's letters do not qualify as Certificates of Extension of Time which would justify the appellant's delay in delivering the vacant possession of the shop office to the respondent.

[27] We also find that the appellant's claims that the breaches by their main contractor, Sara-Timur Sdn. Bhd. and its application for restructuring pursuant to s. 176 of the Companies Act 1965 were events beyond its control to which it was entitled to extensions of time, has no merits. The breaches caused by the main contractor's restructuring exercise were not force majeure events and were not beyond the appellant's control in the project under cl. 13.1.1 of the SPA.

When Was Vacant Possession Of The Shop Office Delivered To The Respondent?

[28] By a letter dated 28 December 2015, the architect of the project who is the second defendant in the High Court had duly certified that the construction of the shop office had been duly completed *via* the architect's Certificate and letter dated 28 December 2015 (encl. 24 at pp. 239 to 240; RA/2D/892 to 893).

[29] On 30 December 2015, the appellant issued a letter informing the respondent that the shop office is ready for delivery of vacant possession, enclosing a certificate of completion from the architect and that the requirements for vacant possession under cl. 13.2.1 of the SPA have been met.

[30] Pursuant to cl. 13.2.2 of the SPA, the respondent would be deemed to have taken the possession of the shop office within 14 days from the date of the letter, which would be 13 January 2016.

[31] The learned High Court Judge found that it is the obligation of the appellant to ensure the availability of permanent access road, the mains for the electricity supply and the water supply to connect them to the shop office ("essential amenities") and the CCC was issued to the respondent before the appellant can deliver vacant possession of the shop office. This is what she held:

> [143] Nevertheless, I was of the view that the words "delivery of vacant possession" in *sub clauses 13.1.1 and 13.2.1 of the SPA must be construed to mean delivery of a vacant constructed property that can be occupied either by the plaintiff as the purchaser or the plaintiff's tenant or licensees.*

[144] I was of this view even though Clause 13.2.1 of the SPA expressly stipulates that upon issuance of the Architect's Certificate, the Defendant/Developer shall let the Plaintiff/Purchaser into possession of the said Property and it was also stated that the delivery of the vacant possession did not give the right for the Plaintiff/Purchaser to occupy the said Property or to make any other alterations until such time as the CCC was issued.

[145] *In other words, in my view. vacant possession can only be lawfully and validly delivered under the SPA if on the date of the delivery of vacant possession, the 1st defendant had made available to the property, the permanent access road and the mains for the electricity supply and the water supply to enable the plaintiff to connect them to the property ("the essential amenities") and the CCC was issued to certify that all the essential amenities have been completed by the 1st defendant as the developer of the Project.* (See: Enclosure 24, p. 70) (emphasis added)

[32] With respect, we are of the considered view that this finding of the learned High Court Judge is erroneous as the definition of the manner of vacant possession was clearly defined in cl. 13.2 of the SPA, which states that upon issuance of a certificate by the appellant's architect certifying that the construction of the shop office has been duly competed, the purchaser having paid all monies payable under the SPA and having performed and observed all terms and conditions on the respondent under the SPA, the appellant shall let the respondent into possession of the shop office however such possession shall not give the respondent, the right to occupy and the respondent shall not occupy the shop office or to make any alterations additions or otherwise to the said shop office until such time as the CCC for the office shop is issued.

[33] We are of the considered opinion that the learned High Court Judge is confused about the manner of vacant possession and the issuance of the CCC. Under the SPA, it is clear that they are totally separate events and caters for different situations.

[34] We further find that the learned High Court Judge should not have interpreted the SPA in such a manner that combined the two separate and distinct events into a single event when they are not. There is no statutory prohibition against the segregation of these two events. The appellant and the respondent have voluntarily entered into the SPA and parties have conducted their affairs in accordance with the terms and conditions of the SPA. The sanctity of the contract entered between parties should be preserved.

[35] In so far as the learned High Court Judge's finding that the CCC procurement and the delivery of vacant possession are very much intertwined as cl. 19 of the SPA could not be invoked without the fulfilment of cls. 20 and 23 of the SPA, we are of the considered view that such a finding is erroneous as in the present case, the SPA makes it distinctly clear that they are not intertwined.

[36] We are of the considered view that the granting of "vacant possession" of the shop office without the right to occupation is nothing novel as even in the sale of "housing accommodation", the previous Schedule H of the Housing Development (Control and Licensing) Regulations 1989 (before the amendments *vide* PU(A) 106/15 which came into force on 1 February 2011) included a clause for vacant possession without according a right to occupation in cl. 27(3) of the statutory Sale and Purchase Agreement as follows:

> (3) Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

[37] As such, without a right of occupation, the issue of actual electricity and water supply are not relevant and neither does the SPA in this case specified these requirements. There is a clear difference between "occupation" and "possession". Vacant possession is not synonymous with the right of occupation.

[38] Since cl. 13.2.1 of the SPA clearly provides for the manner of delivery of vacant possession and which has been complied with, by the appellant, we are of the considered view that delivery of vacant possession to the respondent was on 30 December 2015 as per the appellant's letter bearing the same date.

[39] Our considered view is that there is merit in that the appellant's contention that cl. 13 of the SPA merely requires the appellant to physically complete works and provide a certificate of practical completion by the architect as sufficient to provide vacant possession and that it would matter not, if the shop office was not connected with the essential utilities.

Whether The Respondent Needed To Prove Damages?

[40] The appellant contended that the learned High Court Judge erred in awarding the LAD as it was not proven by the respondent.

[41] Whether the damage is quantifiable or otherwise, the court has to adopt a common-sense approach by taking into account the genuine interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation.

[42] Section 75 of the Contracts Act 1950 provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

[43] Guidance can be found in the Federal Court's decision in *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723, where Richard Malanjum (CJ (Sabah & Sarawak) as he then was) held *inter alia* as follows:

[70] We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

[71] If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to preallocate damages and hence the compensation stipulated in the contract ought to be upheld.

[72] It bears repeating that the court should be slow to refuse to give effect to a damages clause for contracts which are the result of thorough negotiations made at arm's length between parties who have been properly advised. …

[73] At any rate, to insist that the innocent party bears the burden of proof to show that an impugned clause is not excessive would undermine the purpose of having a damages clause in a contract, which is to promote business efficacy and minimise litigation between the parties (see: *Scottish Law Commission, Discussion Paper on Penalty Clauses* (Discussion Paper No 103), December 1997, paras. [5.30]-[5.40]).

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(i) If there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part-payment but also as a guarantee of performance is generally not recoverable.

(ii) Whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part-payment, it is a deposit.

(iii) A deposit is subject to s. 75 of the Act.

(iv) In determining what amounts to "reasonable compensation" under s. 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish* (*supra*) are relevant.

A (v) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss
B or damage which is likely to be suffered by the innocent party.

(vi) *Section 75 of the Act* allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of
C that may be a useful starting point.

(vii) The initial onus lies on the party seeking to enforce a damages clause under *s. 75 of the Act* to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two
D elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

E (viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable. (emphasis added)

[44] From the evidence adduced, we are of the view that the respondent has successfully discharged its burden of proof, firstly, that was a breach of
F contract and that secondly, the SPA contains a clause specifying a sum to be paid upon breach which is cl. 13.1.2 of the SPA read with s. 7 of Schedule A of the SPA. See: *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723.

G **[45]** We find that there are no merits in this contention as the learned High Court Judge was correctly relying on the cases of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817 and *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275; [2002] 5 MLJ 497 when determining that the proof of LAD was not required.

H **[46]** In the present case, under the SPA, the agreed rate of LAD is 10% per annum of the purchase price of the shop office, which is similar to the rate of liquidated damages awarded in statutorily prescribed sale and purchase agreements such as Schedule G or H of the Housing Development (Control and Licensing) (Amendment) Act 2012. Thus, we are of the view that such a rate of LAD is fair and reasonable.
I

[47] In any event, we find that the appellant had failed to plead this point and to prove that the LAD claimed was unreasonable compensation for the breach that has occurred.

Whether The Granting Of Interest To Run From A Date Earlier Than The Judgment Date Is Proper?

[48] On the issue that the learned High Court Judge was wrong in granting the interest on the LAD, to run from a date earlier than the judgment date, we find that there are no merits in this contention. Our considered view is that the learned High Court Judge has correctly exercised his discretion and held in paras. 234 and 235 of her grounds of judgment, as follows:

> [234] In my view, the parties to the SPA were fully aware that if there was a delay in the delivery of vacant possession of the property by the 1st defendant, the 1st defendant would be liable to pay LAD immediately commencing on 04.06.2015 calculated in accordance with the formula stipulated in the SPA on a daily basis.
>
> [235] *Since the plaintiff has been kept out of being paid the LAD and since vacant possession was only lawfully and validly delivered on 26.08.2016. it is only fair that the interest of 5% per annum commences on that date instead of on the judgment date of 18.07.2018.* (emphasis added)

Whether The Respondent's Action Against The Appellant Is Premature?

[49] The appellant also contended that there can be no cause of action if the respondent did not take possession as cl. 13.1.3 of the SPA stipulates that the respondent can only sue for LAD only if the respondent takes possession of the shop office. Thus, the respondent has no cause of action as the CCC was only obtained on 26 August 2016 and the writ was filed on 5 August 2016. In the premises, the present action was premature.

[50] The appellant *vide* their letter dated 30 December 2015, gave notice of vacant possession (encl. 24 at pp. 241 to 242; RA/2D/906 to 907) to the respondent and the respondent would be deemed to have taken the possession within 14 days from the date of the letter, which would be 13 January 2016 pursuant to cl. 13.1.3 of the SPA which stated that "Upon the expiry of fourteen (14) days from the date of notice from the developer requesting the purchaser to take possession of the said parcel whether or not the purchaser has actually entered into possession or occupation of the said parcel, the purchaser shall be deemed to have taken delivery of vacant possession of the said parcel and the developer shall thereafter not be liable for any loss and/or damage to the said parcel or to the fixtures and fittings therein."

[51] In the present case, the respondent took vacant possession of the shop office as stated in their letter dated 22 February 2016, in reply to the appellant's letter dated 30 December 2015. Paragraphs 2 and 3 of the respondent's said letter dated 22 February 2016 are reproduced as follows:

A

> 2. We shall take vacant possession of the aforesaid parcel on 25 February 2016 as per confirmation in Ms. Jen Yap email and Clearance Memo dated 19 February 2016.
>
> 3. We also note that there are substantive delays on the delivery of vacant possession of the said parcel. We reserve all our rights against you including the right to claim for liquidated damages under the Sale and Purchase Agreement dated 30/6/2011.

B

[52] In the present case, the respondent took vacant possession of the shop office on 25 February 2016 as stated in their letter dated 22 February 2016.

C

[53] We noted that the architect who is the second defendant in the High Court, had duly certified that the construction of the shop office has been duly completed *via* the architect's certificate *via* letter dated 28 December 2015 (encl. 24 at pp. 239 to 240; RA/2D/892 to 893) and thus, the requirements for vacant possession under cl. 13.2.1 of the SPA have been duly satisfied.

D

[54] Thus, in respect of this contention of the appellant, we are of the considered opinion that there are no merits in this contention as the respondent took possession of the shop office, on 25 February 2016 and the respondent's writ was filed on 5 August 2016. Thus, the present action was not premature.

E

[55] Even if the respondent did not take actual possession of the shop office, we are of the considered view that by virtue of the deeming provision of possession as stated in cl. 13.1.3 of the SPA, the respondent would be deemed to have taken possession and thus entitled to initiate legal action against the appellant.

F

Our Decision

[56] In reaching our conclusion, we were very much guided by the principles on appellate intervention as recently pronounced by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of The Estates of Tan Ewe Kwang, Deceased & Ors* (*Supra*). In our view, the learned High Court Judge's finding that vacant possession of the shop office was given to the respondent on the 26 August 2016 and that it must come together with the CCC, was in our view, plainly wrong.

G

H

[57] We are of the considered opinion that the learned High Court Judge made errors which warranted appellate intervention in the appellant's appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

[58] In the light of our above findings, we are of the respectful view that there are merits in the appellant's appeal and we unanimously allow the appellant's appeal in part.

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[59] In the premises, we order that the appellant shall pay to the respondent, the sum of RM834,246 as liquidated damages which is calculated from 4 June 2015 until 30 December 2015 together with interest of 5% per annum from 18 July 2018 which is the date of the judgment of the High Court until full and final payment. Each party bear their own costs.

[60] The decision of the learned High Court Judge of 18 July 2018 is varied/set aside.